IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 2491 OF 1986

Shantaram Raghunath Khalkar,
New Durga Udyan Nashik Road, Nashik. ... Petitioner

V/s

1. The Nashik Municipal Corporation, Nashik.
2. Administrator, Nahisk Municipal Corporation, Nashik.
3. Anil C. Mahajan, Nashik Municipal Corporation,Nashik. ... Respondents

Mr. S.M. Dharap for the petitioner.

Mr. V.A. Gangal for respondent Nos. 1 and 2.

Mr. S.M. Gorwadkar for the respondent No.3.

ALONGWITH

WRIT PETITION NO. 2083 OF 2002

Anil Chudaman Mahajan ... Petitioner

V/s

1. Nasik Municipal Corporation
2. The State of Maharashtra, Through the Secretary, Urban Development. ... Respondents

Mr. M.S. Karnik for the petitioner.

Mr. V.A. Gangal for the respondent No.1.

Respondent No.2 is served.

AND

WRIT PETITION NO. 2325 OF 2002

Anil Chudaman Mahajan ... Petitioner

V/s

1. Shantaram Raghunath Khalkar
2. Nashik Municipal Corporation, Nashik. ... Respondents

Mr. S.M. Gorwadkar for the petitioner.

Mr. S.M. Dharap for the respondent No.1.

Mr. V. Talkute for the respondent No.2.

CORAM: H.L. GOKHALE &
J.H. BHATIA, JJ.

DATED: 18TH JULY, 2006

ORAL ORDER (Per Gokhale, J.):

1. Writ Petition No. 2491 of 1986 is filed by an employee of the 1st respondent Municipal Corporation. He claimed the post of Fire Superintendent by the method of promotion. The 3rd respondent is an employee who has been appointed to that post on the basis of nomination. This appointment is challenged through this petition.

2. The second petition i.e. Writ Petition No. 2083 of

2002 is filed by the respondent No.3 from Writ Petition No. 2491 of 1986. This petition prays for a declaration that the petitioner therein (i.e. respondent No.3 in the first petition), ought to be appointed to the further higher post of Chief Fire Officer w.e.f. 5.10.1989 and that the 1st respondent was in error in not elevating him to the post of Chief Fire Officer from October, 1989.

3. The third petition i.e. Writ Petition No. 2325 of 2002 is filed by the 3rd respondent from Writ Petition No. 2491 of 1986. He has challenged the resolutions of the Nasik Municipal Corporation passed on 17.11.1994 and 19.10.1996 in favour of the petitioner in Writ Petition No. 2491 of 1986. The 1994 resolution directed that the appointment of the respondent No.3 from Writ Petition No. 2491 of 1986 to the post of Chief Fire Officer had been cancelled and that the post be made available to the petitioner therein. The second resolution of 1996 directed that the petitioner of Writ Petition No. 2491 of 1986 be promoted to the post of Security Officer.

4. For the sake of convenience, we will refer petitioner of Writ Petition No. 2491 of 1986 as

petitioner and respondent No.3 thereto as respondent No.3 throughout even while referring to the parties in the second and the third petition.

5. The short facts leading to this controversy are that the petitioner herein joined the service of erstwhile Nasik Road Municipal Council on 1.11.1979 and worked as Fire Officer, in the then existing Nashik Road Deolali Municipal Council. Later on in November, 1982, three Municipal Councils, namely, Nasik Municipal Council, Nasik Road and Deolali Municipal Council and Satpur Municipal Council were merged in Nasik Municipal Corporation. The services of the employees of the three Municipal Councils were transferred to the newly formed Corporation. As far as the Fire Department in newly formed Corporation is concerned, one Mr. K.R. Gawali, who was earlier working as a Fire Superintendent, was permitted to continue on that post in the newly formed Corporation. He however went on leave for considerable time and the petitioner was handed over the charge of that department from 20.8.1983 until 22.10.1986 when the respondent No.3 came to be selected to the post of Fire Superintendent and the petitioner had to hand over the charge to him.

6. It so happened that, after the new Municipal Corporation was formed, some times in November, 1982, it had to have a proper officer to head the Fire Department. An advertisement was given on 18th December, 1985 calling upon the appropriate candidates to apply for the post. It is in pursuance to this advertisement that the respondent No.3 was selected and appointed.

7. Being aggrieved by the advertisement, the petitioner herein first filed a Complaint to the Industrial Court at Nasik and contended that it amounted to an unfair labour practice under Items 5, 6 and 9 of the M.R.T.U. & P.U.L.P. Act, 1971. Initially, an ad-interim injunction was granted which was subsequently vacated. It was vacated by holding that the petitioner did not have adequate length of service to be appointed to the post on the basis of the requirement for promotion. Ad-interim order was vacated on 4.6.1986. The petitioner challenged this order vacating ad-interim order by filing Writ Petition No. 2278 of 1986. This petition was rejected by Single Judge by holding that the reasons assigned by the lower Court were quite correct and that even from fresh assessment of the merits, no case was made out.

8. Thereafter the petitioner has filed the present petition No. 2491 of 1986. That time the Complaint filed by the petitioner was pending and, therefore, when the matter came up before a Division Bench on 1.7.1986, Mr. Dharap, learned counsel for the petitioner undertook that the complaint will be withdrawn. Accordingly the complaint was withdrawn. The petition has been subsequently admitted but no interim relief was granted and it has been directed that the appointment that may be made, shall be, subject to the result of the petition.

9. Thereafter the Municipal Corporation has proceeded on the basis of the advertisement and appointed respondent No.3 by issuing an appointment letter dated 6.10.1986. The respondent No.3 took charge on 22.10.1986. The respondent No.3 has been continued on that post of Fire Superintendent since then.

10. The principal contention of Mr. Dharap is that, as per the regulations for filling the concerned post, this post had to be filled in only by promotion. He relied upon the regulations framed under Sec. 465(1)(a) of the Bombay Provincial Municipal Corporation Act, 1949 known

as Regulations of the Municipal Corporation of the City of Nashik for prescribing the qualifications for the appointment of the post of municipal service. In Clause 3 of these regulations, the qualifications that are necessary, are laid down and they are as per Schedule-A and Col.5 appended thereto. Clause 5(a) of these regulations provides that, if the number of posts in the "Cadre" is only one, the appointment shall ordinarily be made by promotion. The submission of Mr. Dharap is that, in the instant case there was only one post of Fire Superintendent, the petitioner was officiating on that position and the post should not have been advertised at all.

11. Now, what is material to note is that, at that time Nasik was a newly formed Municipal Corporation and it required a appropriate qualified officer to head the Fire Department. The advertisement issued by the Municipal Corporation laid down that the person concerned will have to be either B.E. (Fire) or having N.F.S. or similar qualification. Mr. Dharap, learned counsel for the petitioner pointed out that Schedule-A to these regulations provided for two avenues, one by nomination and the other by promotion. The principal submission of Mr. Dharap is that the post ought to have

been filled in by promotion itself. Now as per the schedule, for promotion from amongst the existing candidates, the persons concerned had to be Matriculate with Physics or Chemistry as one of the subjects and had to be working in the post as Station Officer continuously for a period of not less than 10 years. In the instant case, it is clear that the petitioner did not have the experience of having worked in the position of Station officer for more than 7 years. Obviously, he cannot be considered to be qualified for being promoted. It is of course his case that he was working as Fire Officer, which according to him was a higher position in the erstwhile Nashik Municipal Council. The salary on that post was Rs.335-680 which is same as Station Officer and even if all that experience is counted, petitioner's experience was not adequate. In a situation like this, if the Municipal Corporation went for advertisement, prima facie, it cannot be faulted for.

12. The second submission of Mr. Dharap is that, assuming that only advertisement could be given, the advertisement did not give correct qualification. As per the schedule, it is necessary that, apart from having the degree in Engineering or N.F.C.

qualification, the person concerned ought to have minimum experience of three years in the fire service with Government or local body or private concern. Mr. Dharap contended that respondent No.3 did not have this three years' experience though such a specific plea of not having three years' experience is not raised in the petition. It is undoubtedly stated generally that the respondent No.3 did not have the necessary experience. A reply has been filed by the Corporation and it is pointed out that prior to his selection respondent No.3 was working with Asia Engineering Company at Mumbai in the Fire Department. He is B.E. in Fire and also has this N.F.S. qualification. In view of these qualifications, when the selection list was prepared, respondent No.3 stood at No.2 and one Mr. Chaudhari at No.1. Mr. Chaudhari did not join. Respondent No.3 came to be appointed in 1986. We could have accepted the submission of Mr. Dharap if the petition was filed by somebody who claimed that he was having three years' experience. The petition is by a person who is seeking his elevation by promotion. He is himself not having the necessary qualification for promotion. As far as the elevation of the respondent No.3 by nomination is concerned, the petitioner cannot make a grievance about the same, inasmuch as, he did not fall in that category

at all. The Municipal Corporation has not considered the petitioner principally because he did not have necessary qualification for being promoted. That being so, in the situation in which the Corporation was placed, assuming that there was some defect in its advertisement, that defect cannot be blown up beyond a proportion at the instance of the petitioner who himself was not a qualified person. As stated earlier, the Municipal Corporation needed a properly qualified person with the educational back ground to head the department. It was a newly formed Corporation and assuming that there was any such error in the advertisement, it is not something which should vitiate the selection at the instance of somebody who did not fall in the particular category, and himself did not have the qualification as per his own category.

13. Mr. Dharap submitted that, Clause 6 of the regulations provides that the reasons had to be recorded as to how the respondent No.3 was being selected. Again as stated above, that will be for the person concerned who seeks his elevation by nomination and not for a person who is trying to get the elevation to the post by promotion. It is further material to note that the relevant rules provided that, if no candidate is found

suitable for promotion, in that case the reasons are to be recorded. In the present case, the respondent Corporation did not find the petitioner eligible itself. Eligibility is different from suitability. Inasmuch as, petitioner was not eligible, there is no question of his being informed about the reasons as to why he was not found suitable. He was not eligible at all.

14. In the circumstances, as far as this Writ Petition No. 2491 of 1986 is concerned, we do not find any merit therein and we cannot find fault in the slection of respondent No.3. This petition is, therefore, dismissed.

15. As far as the second Writ Petition No. 2083 of 2002 is concerned, it is filed by respondent No.3 praying that not filling the higher post of Chief Fire Officer right from 5.10.1989 was illegal. It is submitted by Mr. Karnik, learned counsel for the respondent No.3 that, merely because this dispute was pending, the post should not have been left un-filled. Mr. Gangal for the Municipal Corporation, on the other hand, submits that the appointment of respondent No.3 itself was subject to the result of the first petition. That being so, the Municipal Corporation did not think

it appropriate to fill in that post. In any case, now that Writ Petition No. 2491 of 1986 is dismissed, surely the respondent No.3 can be given the benefit of the resolution of the Municipal Corporation which the Municipal Corporation had passed. The Corporation had passed a resolution on 17.1.1987 to upgrade the post of the Fire Superintendent to that of Chief Fire Officer. That was forwarded to the State Government on 1.3.1989 and the State Government granted its sanction on 5.11.1989. The respondent No.3 can be elevated to that post from 5.11.1989. That will however be for the Corporation to take its decision and we expect the Corporation to take the appropriate decision. Mr. Gangal very fairly states that the Corporation will treat the respondent No.3 on that post from 5.11.1989. This works out the Writ Petition No. 2083 of 2002.

16. The third petition i.e. Writ Petition No. 2325 of 2002 is filed by the respondent No.3 to challenge the resolution of 17.11.1994 passed by the Municipal Corporation as also the subsequent resolution dated 19.10.1996. The resolution of 1994 directed that the petitioner be promoted to the post of Fire Superintendent and that the appointment of the respondent No.3 was illegal and that injustice has been

done to the petitioner in not promoting him to that post. Apart from the fact that, in the facts of the case the resolution was not called for, it is material to note that the petitioner had moved for an injunction in the Industrial Court but that was not granted. That order was confirmed by the High Court and thereafter respondent No.3 was promoted to the post of Fire Superintendent. On this back ground, the General Body of the Corporation was not expected to pass such a resolution on 17.11.1994.

17. Mr. Dharap, learned counsel appearing for the petitioner, on the other hand, submits that the resolution was fully justified and had recognised the merits of the submissons of the petitioner. As stated above, the facts are to the contrary and in our view, the Corporation’s General Body was undoubtedly in error in passing this resolution which amounted to taking a decision contrary to the interim order passed by the Industrial Court which had been confirmed by the High Court on merits. It is true that the complaint was subsequently withdrawn. But in any case, the observations of the High Court had approved the approach of the Corporation on the administrative side. In the circumstances, this petition challenging the resolution

dated 17.11.1994 is allowed and we declare that the resolution dated 17.11.1994 is hereby quashed and set aside. As far as the resolution dated 19.10.1996 is concerned, this resolution promoted the petitioner to the post of Security Officer. Mr. Gorwadkar appearing for the respondent No.3 has no objection to the petitioner being promoted in the post of Security Officer. As far as the Corporation or the Commissioner to whom Mr. Gangal represents, they have also no objection for the petitioner being continued as the Security Officer. Mr. Dharap informed that the petitioner has been confirmed in that post. That being the position as far as this resolution of 1996 is concerned, we do not think it necessary to quash and set it aside. Thus the petition is allowed in part.

18. The petitioner will be given the benefit of the pay-scales of the Security Officer from the date on which he was appointed as the Security Officer.

19. All three petitions disposed of with no order as to costs.

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(H.L. Gokhale, J.)

(J.H. Bhatia, J.)